Buang bin Mohamad v Awang Jimat bin Awang Nook & Ors

HIGH COURT(SABAH & SARAWAK) — SUIT NO MR 44 OF 1994
HASAN JC
13 MAY 1999

Land Law *— Sale of land — Fraud alleged — Contravention of title conditions of land or by reason of fraud or unconscionability — Plaintiff may adduce oral evidence to vary power of attorney — No execution of transfer — Whether allegation of fraud and unconscionability proved — Whether action should be dismissed for non-joinder of chargee*

The plaintiff was the registered proprietor of a parcel of land. The land was subject to a restriction that no transfer affecting the land may be effected without the consent of the Director of Lands and Surveys. The plaintiff alleged that he signed a sale and purchase agreement to sell the land to the first defendant for the purchase price of RM150,000. A power of attorney was registered in the name of the second defendant. The second defendant sold the land to a third party who subsequently sold it to the third and fourth defendant. A deed of substitution of power of attorney in favour of the third and fourth defendant was then registered. The land was charged to Hock Hua Bank Bhd. The plaintiff brought an action seeking a declaration that all the dealings, transactions and instruments relating thereto on the land involving all defendants were null and void for contravention of the title conditions of the land or by reason of fraud or that they were unconscionable or alternatively for an order that the power of attorney and all the transactions carried out in exercise of the powers conferred be set aside. The second defendant contended that the land was sold to him for RM70,000 by way of power of attorney. The third and fourth defendants contended that they were bona fide purchasers for value of the land. The defendants raised two questions of law, name: (i) whether the plaintiff was estopped from contradicting the power of attorney; and (ii) whether the action should be dismissed for non-joinder of the chargee.

Held, dismissing the claim:

(1) The plaintiff was entitled under s 92 of the Evidence Act 1950 to prove by parole evidence that the power of attorney was obtained by fraud or that there was a failure of consideration. Therefore the defendants' submission that the plaintiff was estopped from denying that he executed a power of attorney and that under s 94 of the Evidence Act 1950 he was not entitled at this stage to adduce oral evidence to vary the power of attorney was devoid of merits (see p 246E–F).

(2) The non-joinder of the chargee would not entitle the court to dismiss the plaintiff's case. Order 15 r 6(1) of the Rules of the High Court 1980 permits the court to hear the plaintiff's claim (see p 247D–E).

(3) The relevant restriction and special condition relating to the land restricts only the transfer of the land without consent but there was no restriction on other forms of dealing relating to the land. The word 'transfer' in the said restriction and special condition must be given its meaning in the context of s 137 of the Sarawak Land Code. Under s 137 of the Sarawak Land Code, the transfer of any land, in order to be effective, must be in Form G for the purpose of registration. In the present case, no such memorandum of transfer had been executed and registered. Under such circumstances, there was no transfer of the land from the plaintiff to the defendants by virtue of the transactions made by the parties relating to the land (see p 248F–H).

(4) Assuming that the effect of those transactions was that the land had been transferred to the defendants, there was only a breach of the title condition of the land and this does not entitle the court to make a declaration that the transactions were null and void. To make such declaration, the transaction must contravene a written law which prohibit such transaction. In the premises, the submission made by the plaintiff that the transactions were void by virtue of s 24 of the Contracts Act 1950 was devoid of merits (see p 249A–D).

(5) The plaintiff was only required to prove his allegation of fraud on balance of probabilities. Based on the facts and evidence of the case, the court found that on the balance of probabilities the plaintiff had not proved his allegation of fraud as well as his allegation that the transactions involving the power of attorney were unconscionable. When he signed the said power of attorney, he was aware of the nature of the document and he understood its contents and as such he could not now be allowed to say that the transactions were unconscionable. The power of attorney was not obtained by fraud and the second defendant had given consideration for it which means that it was a valid document (see p 254G–I).

(6) It was clear that under the power of attorney, the second defendant was given the power to sell the land and to receive and take the purchase money. Hence, it follows that the third and fourth defendants were also bona fide purchasers for value. By virtue of the deed of substitution of power of attorney, the third and fourth defendants had acquired a registered interest over the land. The interest acquired by them could only be set aside on ground of fraud under ss 132 and 134 of the Land Code. There was no allegation of fraud against the third and fourth defendants by the plaintiff (see p 255C–E).

[Bahasa Malaysia summary

Plaintif adalah tuan punya berdaftar sebidang tanah. Tanah tersebut adalah tertakluk kepada sekatan bahawa tiada pindahmilik berkaitan dengan tanah tersebut boleh dilaksanakan tanpa kebenaran Pengarah

Tanah-tanah dan Kerja-kerja Mengukur. Plaintif mengatakan bahawa beliau menandatangani suatu perjanjian jual beli untuk menjual tanah tersebut kepada defendan pertama untuk harga belian sebanyak RM150,000. Surat kuasa wakil telah didaftarkan di dalam nama defendan kedua. Defendan kedua telah menjual tanah tersebut kepada pihak ketiga yang kemudiannya menjualnya kepada defendan-defendan ketiga dan keempat. Suatu suratikatan penggantian surat kuasa wakil di atas nama defendan ketiga dan keempat telah didaftarkan. Tanah tersebut digadaikan kepada Hock Hua Bank Bhd. Plaintif membawa tindakan memohon suatu deklarasi bahawa semua urusan-urusan, transaksi-transaksi dan suratcara- suratcara berkaitan dengan tanah tersebut yang melibatkan kesemua defendan-defendan adalah batal dan tak sah kerana pelanggaran syarat-syarat hakmilik tanah tersebut atau atas alasan fraud atau bahawa ia adalah tidak berpatutanatau secara alternatif untuk suatu perintah bahawa surat kuasa wakil dan semua transaksi-transaksi yang dilaksanakan di bawah pelaksanaan kuasa-kuasa yang dikurniakan tersebut diketepikan. Defendan kedua menegaskan bahawa tanah tersebut dijual kepada beliau untuk RM70,000 melalui surat kuasa wakil. Defendan-defendan kedua dan ketiga menegaskan bahawa mereka merupakan pembeli-pembeli bona fide dengan nilai tanah tersebut. Defendan-defendan menimbulkan dua persoalan-persoalan undang-undang, iaitu: (i) sama ada plaintif adalah diestop daripada menyangkal surat kuasa wakil tersebut; dan (ii) sama ada tindakan tersebut sepatutnya ditolak disebabkan tiada percantuman pemegang gadaian.

Diputuskan, menolak tuntutan:

(1) Plaintif adalah berhak di bawah s 92 Akta Keterangan 1950 untuk membuktikan melalui keterangan parol bahawa surat kuasa wakil tersebut adalah diperolehi melalui fraud atau bahawa terdapatnya kegagalan balasan. Maka hujahan defendan-defendan bahawa plaintif adalah diestop daripada menafikan bahawa beliau menyempurnakan suatu surat kuasa wakil dan bahawa di bawah s 94 Akta Keterangan 1950 beliau adalah tidak berhak pada tahap ini untuk mengemukakan keterangan lisan untuk mengubah surat kuasa wakil tersebut adalah tanpa merit-merit (lihat ms 246E–F).

(2) Tiada percantuman pemegang gadaian tidak akan memberi hak kepada mahkamah untuk menolak kes plaintif. Aturan 15 k 6(1) Kaedah-kaedah Mahkamah Tinggi 1980 membenarkan mahkamah untuk mendengar tuntutan plaintif (lihat ms 247D–E).

(3) Sekatan relevan dan syarat khas berkaitan dengan tanah tersebut cuma menyekat pindahmilik tanah tersebut tanpa kebenaran tetapi tiada sekatan di dalam bentuk-bentuk lain urusan berkaitan dengan tanah tersebut. Perkataan 'pindahmilik' di dalam sekatan dan syarat khas yang dikatakan tersebut mesti diberikan maksudnya di dalam konteks s 137 Kanun Tanah Sarawak. Di bawah s 137 Kanun Tanah Sarawak pindahmilik sebarang

apa-apa tanah, untuk menjadi sempurna, mesti dalam Borang G untuk tujuan pendaftaran. Di dalam kes ini tiada memorandum pindahmilik sedemikian telah disempurnakan dan didaftarkan. Di bawah keadaan-keadaan sedemikian, tiada pindahmilik tanah tersebut daripada plaintif kepada defendan-defendan oleh sebab transaksi-transaksi yang dibuat oleh pihak-pihak berkaitan dengan tanah tersebut (lihat ms 248F–H).

(4) Mengandaikan bahawa kesan transaksi-transaksi tersebut adalah bahawa tanah tersebut telah dipindahmilik kepada defendan-defendan, terdapat sahaja kemungkiran syarat hakmilik tanah tersebut dan ini tidak memberi hak kepada mahkamah untuk membuat deklarasi bahawa transaksi-transaksi tersebut adalah batal dan tak sah. Untuk membuat deklarasi sedemikian, transaksi tersebut mesti melanggar suatu undang-undang bertulis yang melarang transaksi sedemikian. Di dalam hujahan yang dibuat oleh plaintif bahawa transaksi-transaksi sedemikian adalah tak sah oleh sebab s 24 Akta Kontrak 1950 adalah tanpa merit-merit (lihat ms 249A–D).

(5) Plaintif hanya diperlukan untuk membuktikan pengataan fraud atas imbangan kebarangkalian. Berdasarkan fakta-fakta dan keterangan kes, mahkamah mendapati bahawa atas imbangan kebarangkalian plaintif belum membuktikan pengataan fraud dan juga pengataan beliau bahawa transaksi-transaksi yang melibatkan surat kuasa wakil tersebut adalah tidak berpatutan. Apabila beliau menandatangani surat kuasa wakil yang dikatakan tersebut beliau sedar akan jenis dokumen tersebut dan beliau memahami kandungan-kandungannya dan maka demikian beliau tidak boleh sekarang dibenarkan untuk menyatakan bahawa transaksi-transaksi tersebut adalah tidak berpatutan. Surat kuasa wakil tersebut tidak diperolehi melalui fraud dan defendan kedua telah memberi balasan untuknya yang bermaksud bahawa ia adalah dokumen sah (lihat ms 254G–I).

(6) Adalah jelas bahawa di bawah surat kuasa wakil tersebut defendan kedua telah diberi kuasa untuk menjual tanah tersebut dan untuk menerima dan mengambil wang belian. Maka, bermakna defendan-defendan kedua dan ketiga adalah pembeli-pembeli bona fide dengan nilai. Oleh sebab suratikatan penggantian surat kuasa wakil tersebut, defendan-defendan ketiga dan keempat telah memperolehi suatu kepentingan berdaftar ke atas tanah tersebut. Kepentingan yang diperolehi oleh mereka cuma boleh diketepikan atas alasan fraud di bawah ss 132 dan 134 Kanun Tanah tersebut. Tiada terdapatnya pengataan fraud terhadap defendan-defendan ketiga dan keempat oleh plaintif (lihat ms 255C–E).]

Notes

For cases for sale of land generally, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2435–2819.

Cases referred to

Kho Kwang Choon v Phuman Singh [1968] 1 MLJ 183 (refd)

Legislation referred to

Sarawak Land Code ss 132, 134, 188–191

MS Sandhu (*MS Sandhu & Co*) for the plaintiff.
Tai Choi Yu (*Tai Choi Yu & Co*) for the second defendant.
KY Lin (*Kadir Wong Lin & Co*) for the third and fourth defendant.

Hasan JC: In this action the plaintiff is seeking a declaration that all the dealings, transactions and the instruments relating thereto on that parcel of land described as Lot 1433 Block 1 Lambir Land District ('the said land') involving all the defendants are null and void for contravention of the title conditions of the said land or by reason of fraud or that they are unconscionable or alternatively for an order that the power of attorney registered as Instrument No L 1910/1992 and Instrument No L 4462/1992 and all the transactions carried out in exercise of the powers therein conferred be set aside. Also as an alternative prayer the plaintiff is claiming for an order for the rescission of the sale and purchase agreement dated 19 March 1992. In addition the plaintiff is also claiming damages against the first and second defendants.

According to the learned counsel for the plaintiff the plaintiff's claims against the defendants are rooted on the following causes of action:

(i) that the plaintiff sold the said land to the first defendant for RM150,000 and not to the second defendant for RM70,000 by way of power of attorney Instrument No L 1910/1992 as alleged by the second defendant;

(ii) that the plaintiff's signature on the power of attorney Instrument No L1910/1992 was procured by fraud;

(iii) that the deed of substitution Instrument No L 4463/1992 was null and void, having been granted by the enabling powers under the said power of attorney which was invalid null and void; and

(iv) that the said power of attorney and the deed of substitution and all transactions carried out in exercise thereof were null and void for the above reasons and for contravention of the title condition of the said land.

The parties have agreed to the following facts:

1 At all material times, the plaintiff was, and still is, the registered proprietor of all that parcel of land situated at Lusut, Miri containing an area of 1290 square metres more or less, and described as Lot 1433 Block 1 Lambir Land District.

2 The said land was subject to restriction and special conditions, inter alia, as follows:

> No transfer affecting this land may be effected without the consent in writing of the Director of Lands and Surveys during the initial period of 10 years from the date of registration of this grant.

3 The title was registered in the name of the plaintiff on 4 May 1987. A

4 The power of attorney was registered in the name of the second defendant at the Miri Land Registry Office on 18 March 1992 as Instrument No L 1910/1992.

5 On 19 March 1992, the plaintiff and the first defendant entered into a sale and purchase agreement affecting the said land. B

6 On 8 May 1992, the second defendant executed a sale and purchase agreement in favour of Jong Nam Fah and Chia Siew Moi (f) affecting the said land under and by virtue of the said power of attorney Instrument No L 1919/ 1992.

7 On 11 May 1992, the said Jong Nam Fah and Chia Siew Moi (f) C entered into a sale and purchase agreement with the third and fourth defendants affecting the said land.

8 A deed of substitution of power of attorney in favour of third and fourth defendants was registered at the Miri Land Registry Office on 7 July 1992 as Instrument No L 4462/1992. D

9 The said land was charged to Hock Hua Bank Berhad at the Miri land Registry Office on 7 July 1992 under Instrument No 4463/1992.

10 On 20 July 1994, the plaintiff lodged a caveat against the said land and the same was registered at the Miri Land Registry Office on the same date as Instrument No L 5373/ 1994. E

The plaintiff's case is that he sold the said land to the first defendant at the agreed price of RM150,000 with RM15,000 as deposit to be paid and the balance sum of RM135,000 to be paid within three months based upon his testimony:

(i) that oral agreement on the said terms was reached on 17 March 1992 F and he handed the document of title to the first defendant to obtain loan;

(ii) that on 18 March 1992, he met the first defendant and the second defendant in front of Bank Bumiputra and subsequently signed a document in the office of M/S Jaini Mardi & Associates which he understood to be a sale and purchase agreement and received G RM15,000 in cash as deposit from the second defendant representing the first defendant;

(iii) that same afternoon, the first defendant visited his house and gave a cheque of RM135,000 (exh P1) and obtained his signature on a blank payment voucher; H

(iv) that later on the same day, he was told by his daughter-in-law (PW4) that the cheque contained an error in that the sum RM135,000 as stated in words was 'one hundred and thirty five'; and

(v) that after he had lodged a police report No 6247/98 (exh P2) in October 1992, Inspector Halim, the investigating officer gave him a I copy of the power of attorney and he then realized that he had not signed a sale and purchase agreement on 18 March 1992 and that he had been cheated.

The case for the second defendant is that on 18 March 1992 at about 9am the plaintiff and the first defendant came to his office and offered to sell the said land. After negotiation they agreed that the selling price of the said land was RM70,000. All of them then went to the office of Messrs Jaini Mardi & Associates in Miri where they met with Mr Bong Ah Loi (DW2) and they later executed the necessary document for the sale and purchase of the said land. Later at about 3pm after confirming that the document had been registered with the Land and Survey Department, Miri he paid RM70,000 in cash to Mr Bong Ah Loi in the presence of both the plaintiff and the first defendant. At the same time he issued a payment voucher under his company's name (exh P3) which was signed by the plaintiff as an acknowledgement that he had received the purchase price for the said land from the second defendant.

The second defendant identified the document at pp 40 to 43 of Bundle A (the power of attorney dated 18 March 1992) as the document he signed on 18 March 1992 in Mr Bong's office. He also stated that the words 'being full payment for Lot 1433 Block 1 Lambir Land District pursuant to power of attorney (Irrevocable) made in favour of Lieu Sin Kong' and the other particulars written in the middle part of exh P3 were typed in Mr Bong's office.

DW2, Mr Bong Ah Loi, testified in court that on 18 March 1992 the plaintiff, first defendant and second defendant came to his office at about 10 to 10.30am regarding the sale and purchase of the said land. After looking at the land title he advised the parties that the transfer of the land could not be effected within the first 10 years and he further told them that the most usual way for this kind of transaction is by way of an irrevocable power of attorney. He then prepared the power of attorney and explained the contents to them and after that the plaintiff and the second defendant signed the document. He also confirmed that the payment voucher (exh P3) was signed by the plaintiff in his presence and he also handed the money to the plaintiff.

The case for the third and fourth defendants is that they are bona fide purchasers for value of the said land. On or about 11 May 1992 one broker by the name of Mr Thoong approached the third defendant (fourth defendant is his wife) whether he was interested in buying the said land and he then approached Mr Jimmy Wee, a very senior solicitor practising in Miri. He realized that there was a 'no transfer' condition on the said land. He consulted Mr Jimmy Wee whether it was okay to buy the said land. Mr Jimmy Wee told him it was okay.

Upon advised, a sale and purchase agreement was made between the third and fourth defendants on one part and Jong Nam Fah & Chia Siew Moi on other part. A sum of RM49,440 was paid to the vendor through Mr Wee on 15 June 1992. The third and fourth defendants had to raise a loan of RM92,000 from Hock Hua Bank Berhad. A memorandum of charge was prepared by another firm of solicitor M/s Khoo & Co. A deed of substitution of the power of attorney was registered at the Miri Land & Survey Department on 7 July 1992 under Instrument No L 4462/1992. The said memorandum of charge was signed by the third and fourth defendants

by virtue of the deed of substitution and subsequently duly registered at Miri Land & Survey on 7 July 1992 under Instrument No 4463/1992. A

The balance in the sum of RM92,160 was paid to the vendor through Mr Wee on 11 July 1992 on account of the loan from Hock Hua Bank Berhad.

The plaintiff had obtained judgment against the first defendant on 18 October 1995 as he did not enter appearance and file a defence to the plaintiff's claim. The counterclaim by the second defendant was dismissed by court on 12 April 1995. B

Before I proceed to deal with the real issues raised in this action I think it is appropriate that I deal with two questions of law raised by the defendants which are as follows: C

(1) whether the plaintiff is estopped from contradicting the power of attorney; and

(2) whether this action should be dismissed for non-joinder of the Chargee, Hock Hua Bank Bhd. D

As regards the estoppel point it was submitted by the learned counsel for the second defendant that the plaintiff is estopped from denying that he executed the power of attorney dated 18 March 1992 and under s 94 of the Evidence Act 1950 the plaintiff is not entitled at this stage to adduce oral evidence to vary the said power of attorney. In this connection I agree with the learned counsel for the plaintiff that this point is devoid of merits. The plaintiff is entitled under s 92 of the Evidence Act to prove by parole evidence that the said power of attorney was obtained by fraud, or that there is a failure of consideration. Proviso (a) to that s 92 states that: E

> any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law. F

As regards the issue of the non-joinder of the chargee the learned counsel for the third and fourth defendants submitted that the failure on the part of the plaintiff to join Hock Hua Bank Berhad, the chargee of the said land, will entitle this court to dismiss the plaintiff's case. According to the learned counsel, the law confers indefeasible title in the chargee upon registration of a charge and further the bank, who advanced RM92,000 loan to the third and fourth defendants, acquired an interest in the said land. As such it is against the natural justice to deprive the interest of Hock Hua Bank Bhd of its RM92,000 without the right of being heard. G H

On this issue the learned counsel for the plaintiff submitted that this issue was not pleaded by the second and fourth defendants and no notice was given by them before or at the trial that they will rely upon this objection. As such it is now too late to raise this issue after both plaintiff and the defendants have closed their respective cases. In support of that the counsel cited the case of *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465. It was further submitted that the matters I

raised by the plaintiff occurred before the creation of the said charge and therefore the bank is not a necessary party. The learned counsel also cited the provision of O 15 r 6(1) of the Rules of High Court 1980 which provides that no cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

It is to be observed that the facts in *Pekan Nenas Industries Sdn Bhd*'s case are not similar to the facts in the present case. In that case it was submitted after the hearing before the Federal Court and while judgment was pending that the purchaser had never been joined as a party to the proceedings, hence, the evidence adduced was unsupported by the pleadings. In that case also the purchaser was given leave to intervene earlier. In the present case there is no evidence that the bank has been notified of this proceedings and furthermore the proceedings is still at the High Court and not at the appellate court. Hence, it is my view that the decision in *Pekan Nenas Industries Sdn Bhd*'s case is not applicable to the facts of this case on the point raised by the learned counsel for the plaintiff that it is too late for the defendants to raise the issue of non-joinder at this stage. However I do not agree with the learned counsel for the defendants that the non-joinder of the chargee of the said land would entitle the court to dismiss the plaintiff's case. Order 15 r 6(1) of the Rules of High Court permits the court to hear the plaintiff's claim. The problem will only arise if the court has to make an order that will affect the interest of the Bank in the said land, ie whether the court can make such an order without giving the bank the right to be heard first. In this connection the Federal Court has held in *Kheng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ 321 that the court had no jurisdiction over any person other than those brought before it, as parties or as persons treated as if they were parties. This means that this court has no jurisdiction to make any orders that might affect the interest of the chargee.

From the pleadings and evidences it is my view that the plaintiff has raised the following main issues for determination:

(1) the transactions contravened the title conditions of the said land;

(2) fraud on the part of the first defendant or the second defendant or by both of them; and

(3) the transactions involving the power of attorney are unconscionable.

As regards the issue of the contravention of the title condition of the said land it was submitted by the learned counsel for the plaintiff that the effect of the creation and registration of the power of attorney Instrument No L 1910/1992 and the deed of substitution Instrument No L 4462/1992 was that the plaintiff had effectively parted with all his interest in the said land and there was to all intents and purposes a transfer by him to the donees. In support of that the learned counsel cited the Federal Court cases of *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 and *Sundang Timber Co Ltd Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200. It was further submitted by the learned counsel that the

contraventions of the title condition in the said land constituted offences under s 33(1) of the Sarawak Land Code and as such the object of the transactions were unlawful and accordingly they are void by virtue of s 24 of the Contracts Act 1950. A

In this respect the learned counsel for the second defendant submitted that the said title condition only prohibits the transfer but it does not affect other dealings. According to the learned counsel it is lawful and valid in law for the plaintiff to execute any instrument of dealing other than a memorandum of transfer relating to the said land. B

The learned counsel for the third and fourth defendants supported the view that there was no transfer of the said land by the plaintiff to the defendants and he further submitted that a declaration that a transaction is null and void could only be made if the transaction contravened a written law which prohibit such transactions. According to the learned counsel the transactions relating to the said land did not breach any provisions under the Land Code which could make the transactions illegal. It was also submitted by the counsel that a breach of the title condition of the said land would only entitle the Director of Land and Survey to forfeit the land under s 33 of the Land Code and under such circumstances the transaction, at best, is illegal but illegality will not defeat the equitable interest acquired by the third and fourth defendants. Only fraud can defeat the third and fourth defendants' equitable interest in the said land. In support of that the learned counsel cited the following cases: C D E

(1) *Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393;

(2) *Saminathan v Pappa* [1981] 1 MLJ 121; [1975] 1 MLJ 263; and

(3) *Kho Kwang-Choon v Phuman-Singh* [1968] 1 MLJ 183. F

The relevant restriction and special condition relating to the said land, in my view, restricts only the transfer of the said land without consent but there is no restriction on other forms of dealing relating to the said land. Under s 137 of the Sarawak Land Code the transfer of any land, in order to be effective, must be carried out by executing a memorandum of transfer in Form G for the purpose of registration. In the present case no such memorandum of transfer had been executed and registered. It is my view that the word 'transfer' in the said restriction and special condition relating to the said land must be given its meaning in the context of s 137 of the Sarawak Land Code. Under such circumstances, I hold that there was no transfer of the said land from the plaintiff to the defendants by virtue of the transactions made by the parties relating to the said land. With respect I am unable to agree with the submission made by the learned counsel for the plaintiff that the plaintiff had effectively parted with all his interest in the said land and there was a transfer by him to the donees. It is my view that the law as stated by the Federal Court in *Lo Su Tsoon Timber Depot*'s case and *Sundang Timber*'s case is not applicable to the facts of the present case as there is a specific provision under s 137 of the Sarawak Land Code relating to the procedure for the transfer of land. In addition in those two G H I

A cases the transfer of the licence was done in contravention of the express provisions under the Forest Enactment 1968 which prohibit the transfer of the licence in any manner whatsoever.

As to the issue of whether the said transactions can be declared as null and void, assuming that the effect of those transactions was that the land B had been transferred to the defendants, I agree with the learned counsel for the third and fourth defendants that what happened in the present case is that there was only a breach of the title condition of the said land and this does not entitle the court to make such declaration. To declare a transaction as null and void the transaction must contravene a written law which prohibit such transaction. In *Badiaddin bin Mohd Mahidin v Arab Malaysian* C *Finance Bhd* his Lordship Azmi FCJ had this to say at p 409:

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory D prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction.

In the premises I hold that the submission made by the plaintiff that the said transactions are void by virtue of s 24 of the Contract Act, 1950 is devoid of merits.

E As regards the issue of fraud the learned counsel for the second defendant submitted that the plaintiff must prove actual fraud beyond reasonable doubt. In support of that the learned counsel cited the case of *Saminathan v Pappa* [1981] 1 MLJ 121. In that case the Federal Court held that as regards fraud the plaintiff must prove not on a balance of F probabilities but beyond reasonable doubt. That decision was affirmed by the Privy Council. However in *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45 the Federal Court, after reviewing the cases on allegation of fraud in civil cases including *Saminathan v Pappa* held that:

> G Whether the allegation of fraud in civil proceedings concerns criminal fraud such as conspiring to defraud, misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt and not on the balance of probabilities. An allegation of criminal fraud in civil or criminal proceedings cannot be based merely on suspicion or speculation. However, where the allegation of fraud is entirely founded on civil fraud and not on criminal conduct or offence, a H balance of probability is applicable. In this case, since the allegation of fraud was purely civil in nature and not based on or connected with a criminal offence, the civil standard was applicable.

Later in *Ong Ban Chai v Seah Siang Mong* [1998] 3 MLJ 349, Mokhtar Sidin JCA had this to say at p 358:

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> A distinction is drawn between criminal fraud and civil fraud in the Federal Court decision in the case of *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased)*

[1997] 2 MLJ 45, which will have a bearing on the standard of proof by the person alleging fraud. A

In view of this latest development on the law relating to the standard of proof by the person alleging civil fraud I agree with the learned counsel for the plaintiff that the plaintiff is only required to prove his allegation of fraud on balance of probabilities in the present case. B

At para 9 of his statement of claim the plaintiff has set out particulars relating to his allegation of fraud against the first defendant and the second defendant. They are as follows:

(a) by concealing and/or failing to disclose to the plaintiff that the document signed by him on 18 March 1992 was a power of attorney and/or by falsely misrepresenting to him that it was a sale and purchase agreement; C

(b) by stating the consideration for the power of attorney as RM70,000 when they well knew that no such sum had been paid to the plaintiff and/or that the stated consideration was a sham; D

(c) by concealing and/or failing to disclose to the plaintiff that the power of attorney executed by him on 18 March 1992 had been registered vide Instrument No L 1910/1992;

(d) by falsely representing to the plaintiff that the sale and purchase agreement executed by him on 19 March 1992 was to replace the aforesaid document executed by him on 18 March 1992 when they well knew at all times and that the said document was a power of attorney which had already been registered as aforesaid; E

(e) the second defendant purporting to deal with the said land as if he had full interest and/or rights over the said land although he was well aware that the plaintiff had not received the full purchase price; F

(f) by concealing and/or failing to disclose to the plaintiff that the second defendant has appointed the third and fourth defendants as attorneys in substitution of himself under a substitution of power of attorney registered as Instrument No L 4462/1992;

(g) by taking advantage of the ignorance and/or lack of knowledge of the true facts by the plaintiff, in particular the execution by him of the said power of attorney, and seeking to profit by their said concealment and non-disclosure. G

It is clear that the plaintiff's allegation of fraud is founded on civil fraud. The plaintiff alleges that he sold the land to the first defendant for RM150,000 and not to the second defendant for RM70,000 by way of power of attorney Instrument No L 1910/1992 as alleged by the second defendant and the plaintiff further alleges that his signature on the said power of attorney was procured by fraud. H

As the issue of fraud involves question of fact I find it necessary at this stage to reproduce the relevant evidence given by the plaintiff. In his evidence the plaintiff stated that on 16 March 1992 at about 4pm the first defendant and his wife went to his house and they discussed about the sale I

of the said land to the first defendant. On the next day, 17 March 1992 the first defendant went to his house again and told him that he agreed to buy the said land. The price for the said land was agreed at RM150,000 and the first defendant agreed to pay a deposit of RM15,000 first and the balance of RM135,000 would be paid in three months. The plaintiff gave the original title of the said land to the first defendant. The first defendant told the plaintiff to meet him at the front of Bank Bumiputra on 18 March 1992 so that they could go to the office of M/s Jaini Mardi & Associates.

On 18 March 1992 at about 2pm the plaintiff met with the first defendant at the front of Bank Bumiputra. At that time the first defendant was together with the second defendant and the first defendant introduced him to the plaintiff as his business partner. The first defendant told the plaintiff that the second defendant would accompany the plaintiff to M/s Jaini Mardi's office for the purpose of preparing the sale and purchase agreement of the said land.

At the office of M/s Jaini Mardi, Mr Bong Ah Loi (DW2) told the plaintiff that he would prepare a sale and purchase agreement and after it was prepared he was asked by Mr Bong Ah Loi to sign the document and Mr Bong Ah Loi also told him that a copy of the agreement would be given to him on the next day. According to the plaintiff he signed the agreement because he trusted Mr Bong Ah Loi and the first defendant and also he believed that the document was a sale and purchase agreement of the said land. He then received a deposit of RM15,000 from the second defendant as the representative of the first defendant.

At about 4pm on that day the first defendant went to his house and gave him a postdated cheque, exh P1 and from that cheque he noticed from the figures written on it that the amount was RM135,000. At the same time the defendant asked him to sign a blank payment voucher, exh P3. Later he showed the cheque to his daughter-in-law, PW4, and she told him that the amount written in words was only RM135.

On 19 March 1992 at about 10am, he went to the office of M/s Jaini Mardi with his son, PW5. He met the first defendant there and the first defendant told him that he had instructed Mr Bong Ah Loi to prepare a new agreement. In the new agreement he found out that the price was reduced to RM70,000 from RM150,000. The first defendant told him that the price was reduced for tax purposes and that the earlier agreement was revoked. He then signed the new agreement.

The plaintiff came to know that the document he signed on 18 March 1992 was not a sale and purchase agreement but it was a power of attorney given to the second defendant after being informed by Inspector Halim who was the investigating officer for his report made on 5 October 1992 against the first defendant.

It was submitted by the learned counsel for the plaintiff that the plaintiff's evidence is supported in material particulars by other evidence on record in particular the evidence of PW4 and PW5. According to the learned counsel the first defendant would not have handed to the plaintiff the cheque for RM135,000 (exh P1) unless on 18 March 1992 he had

already sold the said land and the plaintiff had collected the deposit of RM15,000. Further the said cheque provides strong corroboration that the said land was sold to the first defendant for RM150,000.

As regards the second defendant's case that he purchased the said land for a consideration of RM70,000 by the grant of an irrevocable power of attorney it was submitted by the learned counsel for the plaintiff that it is highly suspect because there is a material deviation from the case as pleaded by the second defendant and as presented by him in court. According to the learned counsel the second defendant's evidence that he had paid RM70,000 in cash to the plaintiff on 18 March 1992 is inherently improbable and should be disbelieved and he gave six grounds to justify his conclusion. It was further submitted by the learned counsel that the second defendant's case that the consideration was RM70,000 could not be believed when tested with other undisputed evidence on the value of the said land at that time.

It is to be observed that the second defendant's evidence was corroborated by the evidence of Mr Bong Ah Loi who is an advocate. He testified that he explained the contents of the power of attorney on 18 March 1992 to both parties before they signed it. The cash of RM70,000 was handed to him by the second defendant and he then released the money to the plaintiff. He also told the court that the payment voucher exh P3 was signed by the plaintiff in his presence in his office and the particulars in exh P3 were typed by his clerk. During the cross-examination by the learned counsel for the plaintiff Mr Bong Ah Loi did not agree that the content of the said power of attorney was not explained to the plaintiff in Bahasa Malaysia. He also disagreed with the suggestion that on that day the second defendant paid only RM15,000. He disagreed with the suggestion that exh P3 was not signed by the plaintiff in his office. I must say that I have no reason to disbelieve the evidence of Mr Bong Ah Loi. The second defendant's evidence must be considered together with the evidence of Mr Bong Ah Loi and other evidences and not in isolation as suggested by the learned counsel for the plaintiff when he submitted that:

> Should this honourable court find that there was no payment of RM70,000 by the second defendant, the court must necessarily reject the evidence of DW2 Bong Ah Loi that he witnessed such payment and that the payment voucher was signed by the plaintiff in the office.

The plaintiff has not established any motive against DW2 for not telling the truth. In fact DW2 was not made a party in this action nor that any allegation was made against DW2 that he acted jointly or in collusion with the second defendant to commit a fraud on the plaintiff.

During the cross-examination by the learned counsel for the second defendant the plaintiff said that he was employed previously by Sarawak Shell Bhd for 35 years as a maintenance supervisor. He had to sign reports which were in English in the course of his job but it was translated into Bahasa Malaysia by his junior officers. He also told the court that he only signed those reports after they were translated to him. According to him, he had studied until standard 3. Under such circumstances I find it most

improbable that the plaintiff was not able to read and write some simple English words. A glance at the power of attorney dated 18 March 1992 would easily show that the document was entitled 'Power of Attorney' and the place where he signed was written as 'Donor'. As a person who had signed many documents in English before for Shell Bhd I think it is highly improbable that the plaintiff was unable to read or understand those words when he signed that power of attorney. Furthermore, the figures 'RM70,000' was written in para 21 of the said power of attorney which could be clearly seen by him.

I also find that his explanation relating to the cheque (exh P1), the payment voucher (exh P3) and the signing of the agreement dated 19 March 1992 with the first defendant is highly suspect. According to the plaintiff the said cheque, exh P1, was given by the first defendant to him at his house on 18 March 1992. Under cross-examination by the learned counsel for the second defendant he said that the cheque was given to him by the first defendant on 17 March 1992. Later he said he was not sure as it happened long time ago. Under cross-examination by the learned counsel for the third and fourth defendants he said the cheque was given on 18 March 1992. His daughter-in-law, PW4, stated in her evidence that the first defendant and his wife came to the plaintiff's house on 18 March 1992 at about 4pm. At about 5pm the plaintiff showed to her the said cheque and she told the plaintiff that the amount written in words was only RM135. In para 6 of his statement of claim it would appear that the plaintiff is alleging that the cheque was given to him by the first defendant on 19 March 1992. However the learned counsel for the plaintiff submitted that the said cheque was given to the plaintiff on 18 March 1992.

According to the plaintiff, after being informed by his daughter-in-law about the error in the cheque, he called the first defendant at his house and the first defendant told him that he would issue a new cheque and asked the plaintiff to collect it from the first defendant's wife. When he went to the first defendant's house on the next day the first defendant's wife told the plaintiff that the first defendant did not leave the cheque with her. Under cross-examination by the counsel for the third and fourth defendants the plaintiff said that he called the first defendant about the cheque on 18 March 1992 at about 6pm. This means that the plaintiff went to collect the new cheque from the first defendant's wife on 19 March 1992.

It is to be noted that the plaintiff has stated in his evidence that on 19 March 1992 he went to the office of M/s Jaini Mardi with his son, PW5. He met with the first defendant there and later they signed a sale and purchase agreement relating to the said land at the said office which was prepared by Mr Bong Ah Loi. What really puzzled me here is that why did not the plaintiff ask for the new cheque from the first defendant then? In fact there is no evidence to show that the matter had been raised by the plaintiff to the first defendant in that meeting. I also find it hard to believe that the plaintiff had proceeded to sign the sale and purchase agreement dated 19 March 1992 notwithstanding that the first defendant had not issued a new cheque. Mr Bong Ah Loi denied that he prepared the said sale and purchase agreement or even met them at his office on that day. It is stated

in that document that the document was prepared by the parties concerned. It is also to be noted that the plaintiff had not make any prior arrangement to meet with the first defendant at M/s Jaini Mardi's office. According to the plaintiff when he went to the office of M/s Jaini Mardi on 19 March 1992 the first defendant was already there. For the reasons stated above I hold that the plaintiff's case that the sale and purchase agreement was prepared by Mr Bong Ah Loi and was signed at Mr Bong's office is not reasonable or probable.

As regards the payment voucher, exh P3, the plaintiff stated that the first defendant asked him to sign a blank voucher after the first defendant gave him exh P1, the cheque. He signed the voucher and then the first defendant took it back. Exh P3 is the payment voucher of the second defendant's company, 'AUTOCARE'. The word 'AUTOCARE' and the company's address is at the top of the voucher. It is similar to the payment vouchers tendered by the second defendant as exh D1. I do not think the word 'AUTOCARE' and the address could be inserted later after the voucher was signed by the plaintiff. If what was said by the plaintiff is true why did the first defendant use the second defendant's payment voucher?

Accordingly I hold that the version given by the second defendant and DW2 that the plaintiff signed exh P3 at DW2's office is more probable and reasonable.

Based on the reasons given above and after giving a careful consideration to the totality of the evidence adduced and the submissions made by the parties I come to the following finding of facts:

(1) DW2 had explained to the plaintiff the contents of the power of attorney dated 18 March 1992 before it was signed by the parties;

(2) Exh P3 was signed by the plaintiff in DW2's office after he received RM70,000 in cash from the second defendant through DW2; and

(3) The sale and purchase agreement dated 19 March 1992 was not signed at DW2's office and the said document was not prepared by DW2.

For the reasons given above I come to the conclusion that on the balance of probabilities the plaintiff has not proved his case relating to the payment voucher (exh P3), that he signed it at his house while it was blank, the power of attorney dated 18 day of March 1992 and that the sale and purchase agreement dated 19 March 1992 was signed at Mr Bong Ah Loi's office and he also failed to prove his allegation of fraud as stated in para 9 of his statement of claim as well as his allegation that the transactions involving the power of attorney are unconscionable. When he signed the said power of attorney he was aware of the nature of the document and he understood its contents and as such he cannot now be allowed to say that the transactions involving that power of attorney are unconscionable. He could have made a bad bargain but that is not a good ground for this court to set aside the said transactions because it will cause injustice to the defendants.

It is my judgment that the said power of attorney Instrument No L 1940/1990 was not obtained by fraud and the second defendant had given the consideration for it which means that it is a valid document. Power

of attorney is specifically provided under ss 188 to 191 of the Sarawak Land Code and is registrable. The second defendant is a bona fide purchaser for value. Paragraphs 2 and 5 of the said power of attorney provide that:

> 2 To sell, transfer, sublease or otherwise dispose of all or any part or parts of the said land to anyone including the said attorney himself as the said attorney shall deem fit.
>
> 5 To receive and take the purchase money, rent and fee payable in respect of such sale, purchase, sublease, licence, tenancy or any other income due or accruing to the said land or any part thereof and to give good and effective receipts for the same.

It is clear that under that power of attorney the second defendant is given the power to sell the said land and to receive and take the purchase money. Hence, it follows that the third and fourth defendants are also bona fide purchasers for value. They bought the said land after getting a legal advice from Mr Jimmy Wee, a very senior solicitor. They paid the purchase price of RM153,600 for the said land. A deed of substitution of power of attorney in favour of the third and fourth defendants over the said land was registered at the Miri Land Registry Office on 7 July 1992 as Instrument No L 4462/1992 and by virtue of that the third and fourth defendants have acquired a registered interest over the said land. In this respect I agree with the learned counsel for the third and fourth defendants that the interest acquired by them can only be set aside on ground of fraud under ss 132 and 134 of the Land Code. In the present case there is no allegation of fraud against the third and fourth defendants by the plaintiff. In *Kho Kwang Choon v Phuman Singh* [1968] 1 MLJ 183, Williams J had this to say at pp 184I–185B:

> Having considered the legislation immediately pertinent to this case, namely the Land Code (Cap 81, of the Laws of Sarawak), I have come to the conclusion, and most certainly so in the absence of fraud, that once an interest is registered the court has no power to remove or even order the removal of the name of a proprietor therefrom in the manner here prayed; and here I would add that the plaintiff is a registered 'proprietor' of an interest in land. Sections 132 and 134 appear to make this quite clear. Indeed, it may very well be that in so far as the Land Code of Sarawak is concerned the powers of the court are more restricted than those in New Zealand as there express powers are granted to the courts to interfere and order a rectification by the registrar in the case of fraud.

The learned counsel for the plaintiff also submitted that the plaintiff is entitled to judgment as against the third and fourth defendants as prayed for in prayers (3)(i), (ii) and (iii), of his statement of claim on the ground that the power of attorney and deed of substitution contravened s 24 of the Contract Act 1950 and are illegal and therefore ought to be set aside. I have already decided that the transactions involving the said power of attorney and deed of substitution did not contravene the title condition of the said land. In the event that I am wrong in coming to that conclusion I would still hold that the plaintiff is still not entitled to get judgment against the third and fourth defendants because illegality as distinct from fraud is not sufficient to defeat the third and fourth defendants' registered interest in the said land.

For the reasons given above, I dismiss the plaintiff's claim against the second, third and fourth defendants with costs to be taxed unless agreed upon.

As regards the request made by the learned counsel for the third and fourth defendants that a consequential order be made in respect of the caveat I think it is not appropriate for me to make any order in respect of the caveat as the parties have not submitted on that and furthermore the chargee Hock Hua Bank Bhd is not a party to this action.

Claim dismissed.

Reported by Jafisah Jaafar